U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: JUN 27 2013 Office: TEXAS SERVICE CENTER

IN RE: Applicant:

APPLICATION: Application to Register Permanent Residence or Adjust Status (Form I-485) Pursuant to Section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1225

ON BEHALF OF APPLICANT:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Texas Service Center, who certified his decision to the Administrative Appeals Office (AAO) for review. The director's decision is withdrawn and the matter will be remanded to the director for further processing of the applicant's adjustment of status application.

The applicant is a native and citizen of the Czech Republic who filed this application for adjustment of status to that of a lawful permanent resident under section 245 of the Immigration and Nationality Act (INA), 8 U.S.C. § 1255. The applicant is seeking to adjust her status based upon an approved visa petition that was filed on behalf of her father. A review of the record reveals the following facts and procedural history:

The applicant was born on April 14, 1989. The applicant became 21 years of age on April 14, 2010. She entered the United States in January 1995 as a J-2 nonimmigrant. On December 11, 2008, U.S. Citizenship and Immigration Services (USCIS) approved the applicant's father's I-140 petition with a priority date of December 11, 2008. At the time the petition was approved a visa number was available for the applicant. The applicant filed an application for admittance to permanent residence on April 13, 2010.

In his August 15, 2012 Notice of Certification, the director determined that the applicant was not eligible to adjust her status as the child of her father because the applicant did not meet the one-year filing requirement under the Child Status Protection Act (CSPA) and, therefore, does not meet the definition of a "child" under the Immigration and Nationality Act. The director also noted that the Form I-485 entails a novel issue: consideration for qualification under CSPA using the *Murillo* BIA non-binding decision (*In re: Jose Jesus Murillo*, BIA, Oct. 6, 2010) and certified the decision to the AAO pursuant to 8 C.F.R. § 103.4(a).

The director also determined that the applicant had failed to submit documentation showing she obtained counsel prior to the one-year period, and pointed out that the applicant had submitted two I-93 Medical Examination Form(s) signed on two different dates for tests conducted at two different clinics.

The director certified his decision to the AAO and informed the applicant that she had 30 days to supplement the record with any evidence that she wished the AAO to consider. Counsel has supplemented the record.

The Child Status Protection Act (CSPA) amended the Act to permit an applicant for certain immigration benefits to retain classification as a child under the Act, even if he or she reached the age of 21 at the time an application was adjudicated. The CSPA added section 203(h) for individuals, such as this applicant, seeking to derive lawful permanent resident status from a parent's approved immigrant visa petition. Section 203(h) of the INA states, in pertinent part:

RULES FOR DETERMINING WHETHER CERTAIN ALIENS ARE CHILDREN-

(1) IN GENERAL.-- For purposes of subsections (a)(2)(A) and (d), a determination of whether an alien satisfies the age requirement in the matter preceding subparagraph (A) of section 101(b)(1) shall be made using—

(A) the age of the alien on the date on which an immigrant visa number becomes available for such alien (or, in the case of subsection (d), the date on which an immigrant visa number became available for the alien's parent), but only if the alien has sought to acquire the status of an alien lawfully admitted for permanent residence within one year of such availability; reduced by

(B) the number of days in the period during which the applicable petition described in paragraph (2) was pending.

(2) PETITIONS DESCRIBED- The petition described in this paragraph is—

(A) with respect to a relationship described in subsection (a)(2)(A), a petition filed under section 204 for classification of an alien child under subsection (a)(2)(A); or

(B) with respect to an alien child who is a derivative beneficiary under subsection (d), a petition filed under section 204 for classification of the alien's parent under subsection (a), (b), or (c).

Section 203(h) of the INA allows for a calculation of an applicant's age for adjustment of status purposes in the following manner:

- Determine the applicant's age on the date the visa number became available;
- Determine the number of days that the applicant's parent's petition was pending from the date of filing until the date of approval; and
- Subtract the number of days that the petition was pending from the applicant's age as of the visa availability date.

Once the applicant's age is decided, a determination must be made on whether the applicant filed an application for admittance to permanent residence within one year of the visa number becoming available. The "within one year" time period may occur either before or after the date that the visa number becomes available.

The applicant's visa number first became available on December 11, 2008. With a birth date of April 14, 1989, the applicant was 19 years old on December 11, 2008. The applicant's father's I-140 Petition was pending for 308 days from the date it was filed on February 7, 2008 until the date it was approved on December 11, 2008. Therefore, as of the date that the applicant's visa number became available, she was approximately 19 ½ years old and met the definition of a "child" pursuant to section 101(b) of the INA.

The record reflects that the applicant turned 21 on April 14, 2010, the day after the adjustment application was received at the Texas Service Center; however, applications for the entire family were submitted together but one family member's application was improperly filed and the entire package was rejected for improper filing. All of the applications, including the applicant's Form I-485 were properly "filed" one month later.

The director determined that the applicant was not eligible to adjust her status as the child of her father because she did not meet the one-year filing requirement under the Child Status Protection Act (CSPA) and, therefore, does not meet the definition of a "child" under the Act, and certified the decision to the AAO.

On certification, counsel for the applicant, citing the non-binding BIA decision (In re: *Jose Jesus Murillo*, BIA, Oct. 6, 2010), asserts that the applicant is able to avail herself of the age-out protection of the statute, because she "sought to acquire" permanent resident status within one year of the petition approval.

The director noted in the Notice of Certification that the Form I-485 entails a novel issue: consideration for qualification under CSPA using the *Murillo* decision, which involved a "child" in similar circumstances. In that case, an Immigration Judge found the respondent eligible under the CSPA based on her conclusion that the adjustment of status application "did not necessarily have to be timely 'filed' by the derivative child alien to meet the 'sought to acquire' lawful permanent resident status language in section 203(b) of the Act., 8 U.S.C. Sect. 1153(h)(1). The Immigration Judge determined that the phrase "sought to acquire" could, "in certain cases", be satisfied by "circumstances short of filing" the adjustment application, and that element was satisfied in that case because Murillo "hired an attorney to prepare his adjustment application within a year of his immigrant number becoming available, and filed his application within a "reasonable" period thereafter (20 months), and he was still under the age of 21."

The BIA concluded that Murillo "clearly demonstrated an intent to file his application and made such substantial advances (hiring an attorney) toward having the application prepared and filed during the 1-year period that he properly was found to have 'sought to acquire' lawful permanent resident status and remains eligible for adjustment." The BIA stated that to find otherwise would undermine the very purpose and intent of the statute, which was to protect an alien "child" from "aging out" due to "no fault of her own." The BIA dismissed DHS's appeal of the Immigration Judge's decision.

The unpublished decisions of the BIA are not controlling in any other case. However, we look to guidance on the "sought to acquire" issue from a precedent decision published by the BIA which is binding. *Matter of O. Vazquez*, 25 I&N Dec. 817 (BIA 2012).

At a hearing before an Immigration Judge, the respondent in the *Vasquez* case applied for adjustment of status arguing that he sought to acquire permanent residence within 1 year of the visa number becoming available because his parents consulted with a notario about filing an

application within that period. The Immigration Judge denied the respondent's application. While stating that the term "sought to acquire" is ambiguous, the BIA sought to "apply a reasonable interpretation of that language. *Id* at 820. The BIA decided that "[s]ince Congress has afforded aliens a full year, rather than a mere 30 or 60 days, to take advantage of the age-out rule, it is reasonable to expect the proper filing of an application, when it comes to DHS cases, as a way to unquestionably satisfy the 'sought to acquire' element under section 203(h)(1)(A) of the Act. While the proper filing of an application for adjustment of status clearly meets the 'sought to acquire' provision in section 203(h)(1)(A) of the Act, the BIA stated that the statute "may also be satisfied by other actions that fall short of filing." Id at 821.

The BIA's decision noted that:

> "in the context of asylum applications, if an application was filed prior to the expiration of the 1-year deadline but was rejected and returned as not properly filed the applicant's subsequent failure to meet the deadline may be excused if the corrected application is filed within a reasonable period after its return. See 8 C.F.R § 1208.4(a)(t)(v). An application for adjustment would be considered timely filed for purposes of section 203(h)(1)(A) of the Act in similar circumstances.

The BIA concluded that an alien may satisfy the 'sought to acquire' provision of section 203(h)(1)(A) of the Act by properly filing the application for adjustment of status with DHS. Additionally, the alien may meet the requirement by establishing, through persuasive evidence, than application he or she submitted to the appropriate agency was rejected for a procedural or technical reason."

The director stated that the applicant had failed to submit documentation showing she obtained counsel prior to the one-year period, however, the record contains substantial evidence showing that the applicant and her family had engaged the services of an attorney (the attorney on certification) dating back to at least 2004, as the file contains numerous briefs and correspondence from the attorney, as well as I-797s for the applicant that were addressed to the attorney. The director also pointed out that the applicant had submitted two I-93 Medical Examination Form(s) signed on two different dates for tests conducted at two different clinics.

Doubt cast on any aspect of the applicant's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the application. It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). It is not inconceivable that an individual would visit two different medical clinics on two different dates in order to fulfill a medical examination requirement, and the tests do appear to differ from one another. Therefore, the applicant's submission of the two Form(s) I-93 do not have a negative impact on the overall integrity of her application.

Although the applicant's I-140 was submitted after the one-year period, evidence in the record, including evidence that she had engaged the services of an attorney, and completed tests for the required medical examination, show that she had "sought to acquire" permanent resident status within one year of the petition approval. Most importantly, the applicant did, in fact, submit a Form I-485 application. The submission, rejection, and ultimate proper filing of the application were within a reasonable amount of time after her visa number became available and establish that she had taken substantial steps toward applying for adjustment of status. The applicant, therefore, is eligible to derive benefits from her father's approved I-140 Petition.

Pursuant to section 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361, the burden of proof is upon the applicant to establish that she is eligible for adjustment of status. Here, the applicant has met her burden.

ORDER: The director's decision to deny the application is withdrawn. The matter is remanded for the director to continue processing the applicant's Form I-485 application.